Domino's Pizza, LLC *and* Fast Food Workers Committee. Case 29–CA–103180

December 22, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On March 27, 2014, Administrative Law Judge Mindy E. Landow issued the attached decision. The Respondent and Charging Party filed exceptions and supporting briefs. The General Counsel, Respondent, and Charging Party filed answering briefs. The Respondent and Charging Party filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found, applying the Board's decision in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), that the

[1] The Respondent's argument that the Board lacked a quorum at the time it announced the appointment of James G. Paulsen as Regional Director for Region 29, and that consequently the complaint must be dismissed, is without merit. Although Regional Director Paulsen's appointment was announced on January 6, 2012, the Board approved his appointment on December 28, 2011, at which time it had a quorum. See *Mathew Enterprise, Inc. v. NLRB*, 771 F.3d 812, 813 (D.C. Cir. 2014) ("[T]he President's recess appointment of Member Becker . . . was constitutionally valid."); *Gestamp South Carolina, LLC v. NLRB*, 769 F.3d 254, 257–258 (4th Cir. 2014) (same).

The Respondent also argues that at the time the Complaint and Notice of Hearing were issued (July 13, 2013), Acting General Counsel Lafe Solomon had not been "properly appointed under the Federal Vacancies Reform Act (FVRA) and, therefore, could not have lawfully delegated any authority to issue a Complaint" to Regional Director Paulsen. The Respondent reiterates that Solomon's "appointment was invalid" and accordingly, "he lacked standing to act at the time the original Complaint in this matter was issued." Finally, the Respondent cites *Hooks v. Kitsap Tenant Support Services, Inc.*, C13–5470 BHS, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013), for the proposition that "Acting General Counsel Solomon's appointment was invalid."

For the reasons set forth below, we find no merit in the Respondent's argument that the Acting General Counsel was improperly or invalidly "appointed." At the outset, we note that under the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. §§ 3345 et seq., a person is not "appointed" to serve in an acting capacity in a vacant office that otherwise would be filled by appointment by the President, by and with the advice and consent of the Senate. Rather, either the first assistant to the vacant office performs the functions and duties of the office in an acting capacity by operation of law pursuant to 5 U.S.C. § 3345(a)(1), or the President directs another person to perform the functions and duties of the vacant office in an acting capacity pursuant to 5 U.S.C. § 3345(a)(2) or (3).

On June 18, 2010, the President directed Lafe Solomon, then Director of the NLRB's Office of Representation Appeals, to serve as Acting General Counsel pursuant to subsection (a)(3)—the senior agency employee provision. Under the strictures of that provision, Solomon was eligible to serve as Acting General Counsel at the time the President directed him to do so. See *SW General, Inc., v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015). Thus, Solomon properly assumed the duties of Acting General Counsel and we find no merit in the Respondent's argument that the Acting General Counsel was improperly or invalidly "appointed."

We acknowledge that the decision in *SW General* also held that Solomon lost his authority as Acting General Counsel on January 5, 2011, when the President nominated him to be General Counsel. While that question is still in litigation, the Respondent has never raised that argument in this proceeding, and we find that the Respondent thereby has waived the right to do so.

Finally, on November 9, 2015, General Counsel Richard F. Griffin, Jr., issued a Notice of Ratification, which states, in relevant part:

> The prosecution of this case commenced under the authority of Acting General Counsel Lafe E. Solomon during the period after his nomination on January 5, 2011, while his nomination was pending with the Senate, and before my confirmation on November 4, 2013.
>
> The United States Court of Appeals for District of Columbia Circuit recently held that Acting General Counsel Solomon's authority under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., ceased on January 5, 2011, when the President nominated Mr. Solomon for the position of General Counsel. *SW General, Inc. v. NLRB,* __ F.3d __ 2015 WL 4666487, (D.C. Cir., Aug. 7, 2015). The Court found that complaints issued while Mr. Solomon's nomination was pending were unauthorized and that it was uncertain whether a lawfully-serving General Counsel or Acting General Counsel would have exercised discretion to prosecute the cases. *Id.* at *10.
>
> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.
>
> My action does not reflect an agreement with the appellate court ruling in *SW General*. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by *SW General* are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. Id. at *9 (citing 5 U.S.C. § 3348(e)(1)).
>
> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

Thus, even assuming that the Respondent had not previously waived its right to challenge the continued authority of the Acting General Counsel following his nomination by the President, this ratification renders moot any argument that *SW General* precludes further litigation of this matter.

[2] We shall substitute a new notice to conform to the Order as modified.

Respondent violated Section 8(a)(1) of the Act by maintaining an Arbitration Agreement (the Agreement) that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

In *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), enf. denied in relevant part No. 14–60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*. Based on the judge's application of *D. R. Horton*, and on our subsequent decision in *Murphy Oil*, we affirm the judge's findings and conclusions[3] and adopt the recommended Order as modified and set forth in full below.

[3] The Respondent argues that the Agreement complies with *D.R. Horton* by virtue of its exception of "claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board" and because the Agreement provides that "[n]othing shall prevent Employee from filing and pursuing administrative proceedings only before the U.S. Equal Employment Opportunity Commission or an equivalent state or local agency." According to the Respondent, these exceptions provide an avenue for employees to file charges with administrative agencies that have the power to seek classwide relief on behalf of employees. Thus, the Respondent contends that it has met its requirement under *D. R. Horton* to preserve employees' Sec. 7 rights under the Act because it has left open "a judicial forum for class and collective claims." 357 NLRB No. 184, slip op. at 12. We reject this contention for the reasons stated in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

The Respondent and our dissenting colleague contend that the opt-out provision of its arbitration policy places it outside the scope of the prohibition against mandatory individual arbitration agreements under *Murphy Oil* and *D. R. Horton*. The Board has rejected this argument, holding that an opt-out procedure still imposes an unlawful mandatory condition of employment that falls squarely within the rule set forth in *D. R. Horton* and affirmed in *Murphy Oil*. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 4–5 (2015). The Board further held in *On Assignment Staffing Services*, slip op. at 1, 5–8, that even assuming that an opt-provision renders an arbitration policy not a condition of employment (or non-mandatory), an arbitration policy precluding collective action in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Sec. 7 right to engage in concerted activity.

Our dissenting colleague also observes that the Act "creates no substantive right for employees to insist on class-type treatment of non-NLRA claims." This is surely correct, as the Board has previously explained in *Murphy Oil*, supra, slip op. at 13–14, 16–17, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 and fn. 2 (2015). But what our colleague ignores is that the Act does "creat[e] a right to pursue joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, slip op. at 16–17. The Respondent's arbitration policy is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the arbitration policy unlawful runs afoul of employees' Section 7 right to "refrain from" engaging in protected activity. See *Murphy Oil*, slip op. at 18; *Bristol Farms*, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. *Murphy Oil*, slip op. at 17–18; *Bristol Farms*, slip op. at 2.

ORDER

The National Labor Relations Board orders that the Respondent, Domino's Pizza, LLC, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an Arbitration Agreement (the Agreement) that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Agreement or revise it to make clear to employees that the Agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all applicants and current and former employees who were required to sign or otherwise become bound to the Agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised Agreement.

(c) Within 14 days after service by the Region, post at all its facilities nationwide copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since October 19, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certifi-

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

cation of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 22, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.[1]

In this case, my colleagues find that the Respondent's Arbitration Agreement (the Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc*.[2]

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[3] However, I disagree with my colleagues' finding that Section 8(a)(1) of the NLRA prohibits agreements that waive class and collective actions, and I especially disagree with the Board's finding here, similar to the Board majority's finding in *On Assignment Staffing Services*,[4] that class waiver agreements violate the NLRA even when they contain an opt-out provision. In my view, Sections 7 and 9(a) of the NLRA render untenable both of these propositions. As discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[5] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[6] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class waiver agreements;[7] (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitra-

[1] For the reasons stated by my colleagues, I agree that the complaint is properly before the Board for disposition.

[2] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14–60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

[3] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

[4] 362 NLRB No. 189, slip op. at 1, 4–5 (2015).

[5] *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 30–34 (2014) (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[6] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[7] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil USA, Inc. v. NLRB*, above; *D.R. Horton, Inc. v. NLRB,* above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc*., No. 14–CV–5882 (VEC), 2015 WL 1433219 (S.D.N.Y. Mar. 27, 2015); *Nanavati v. Adecco USA, Inc.,* No. 14–cv–04145–BLF, 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.,* No. 1:12–cv–00062–BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

tion Act (FAA);[8] and (iv) for the reasons stated in my dissenting opinion in *Pama Management,* 363 NLRB No. 38, slip op. at 3–5 (2015), the legality of such a waiver is even more self-evident when the agreement contains an opt-out provision, based on every employee's Section 9(a) right to present and adjust grievances on an "individual" basis and each employee's Section 7 right to "refrain from" engaging in protected concerted activities.[9] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.[10]

Accordingly, I respectfully dissent in relevant part.

Dated, Washington, D.C. December 22, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an Arbitration Agreement (the Agreement) that requires our employees, as a condition of employment, to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Agreement or revise it to make clear that the Agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise become bound to the Agreement that the Agreement has been rescinded or revised, and, if revised, WE WILL provide them a copy of the revised Agreement.

DOMINO'S PIZZA, LLC

The Board's decision can be found at www.nlrb.gov/case/29-CA-103180 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[8] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil,* above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[9] The class-action waiver agreements were voluntarily signed, even though the Respondent was willing to hire employees only if they entered into the agreements. For my colleagues, however, the voluntariness of such a waiver is immaterial. They believe that even if a waiver is non-mandatory, it is still unenforceable. See *On Assignment Staffing Services*, above (finding class-action waiver agreement unlawful even where employees are free to opt out of the agreement); *Bristol Farms*, 363 NLRB No. 45 (2015) (finding class-action waiver agreement unlawful even where employees must affirmatively opt *in* before they will be covered by a class-action waiver agreement, and where they are free to decline to do so). By definition, every agreement sets forth terms upon which each party may insist as a condition to entering into the relationship governed by the agreement. Thus, conditioning employment on the execution of a class-action waiver does not make it involuntary. However, the Board's position is even less defensible when the Board finds that NLRA "protection" operates in reverse—not to *protect* employees' rights to engage or refrain from engaging in certain kinds of collective action, but to *divest* employees of those rights by denying them the right *to choose* whether to be covered by an agreement to litigate non-NLRA claims on an individual basis. See *Bristol Farms*, above, slip op. at 2–4 (Member Miscimarra, dissenting).

[10] Because I disagree with the Board's decisions in *Murphy Oil,* above, and *D. R. Horton, Inc.,* 357 NLRB No. 184 (2012), enf. denied in pert. part 737 F.3d 344, 362 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[ ] open a judicial forum for class and collective claims," *D. R. Horton*, 357 NLRB No. 184, slip op. at 12, by permitting the filing of complaints with administrative agencies that, in turn, may file class or collective action lawsuits. See *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013).

Ashok C. Bokde and *Jaime D. Cosloy, Esqs.,* for the General Counsel.
Michael D. Carrouth, Esq. (Fisher and Phillips, LLP), of Columbia, South Carolina, for the Respondent.
Gwynne A. Wilcox and *Michael R. Hickson, Esqs. (Levy Ratner, P.C.),* of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. The charge in this matter was filed by the Fast Food Workers Committee (the Charging Party) on April 19, 2013,[1] against Domino's Pizza, LLC (Respondent). A complaint issued on July 31. The sole remaining issue is whether Respondent's maintenance of an employment rule requiring employees to arbitrate their work-related complaints in an individual capacity, unless they opt out within 30 days of their employment, is unlawful under Section 8(a)(1) of the Act. [2] This case therefore raises issues contemplated but not fully addressed by the Board's decision in *D.R. Horton, Inc*., 357 NLRB No. 184 (2012), enf. granted in part and denied in part 737 F.3d 433 (5th Cir. 2013).

Respondent filed an answer denying the material allegations of the complaint and raising certain affirmative defenses, as discussed below. A hearing in this matter was held before me on December 19, in Brooklyn, New York, and the parties have filed post hearing briefs. After considering the record and the briefs filed by the parties, I make the following

FINDINGS OF FACT

JURISDICTION

At all material times Respondent, a domestic corporation with its principal office located at 30 Frank Lloyd Wright Drive, Ann Arbor Michigan, and places of business located throughout the United States, including 183 Graham Avenue, Brooklyn, New York (Respondent's Brooklyn facility), has been engaged in the business of selling food to the public. During the past year, a period which is representative of its annual operations generally, in the course and conduct of its business operations, Respondent has derived revenues in excess of $500,000 and has purchased and received at its Brooklyn facility goods and products valued in excess of $5000 directly from suppliers located outside the State of New York. I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I. ALLEGED UNFAIR LABOR PRACTICES

Facts

Beginning in November 2009, Domino's team members,[3] were asked to review and sign an arbitration agreement (the Agreement) the relevant portions of which are set forth below. According to Respondent, the Agreement has not been substantively modified or revised since that time. Prospective employees are advised that they must review and sign the Agreement "before commencing your employment." The initial section of the Agreement is entitled "Arbitration of Disputes" and provides as follows:

> Both Employee and Domino's Pizza LLC ("the Company") (the Company is defined herein as including its parents, subsidiaries, affiliates, predecessors, successors and assigns, their (including the Company's) respective owners, directors, officers, managers (both direct and indirect), employees, vendors, and agents), acknowledge that the Company has a system of alternative dispute resolution that includes the binding arbitration to resolve disputes that may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and Employee, both the Company and Employee agree that any claim, dispute, and/or controversy that the Employee or the Company may have against the other shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, 9 U.S.C. Sections 1-16. This specifically includes any claim, including any claim brought on an individual, class action, collective action, multiple-party, or private attorney general basis by Employee or on Employee's behalf, Employee may have against the Company, which would otherwise require or allow access to any court or other governmental dispute resolution forum arising from, related to, or having any relationship or connection whatsoever with Employee's seeking employment with, employment by, termination of employment, or other association with the Company, whether in contract, or tort, pursuant to statute, regulation, or ordinance, or in equity or otherwise (including, but not limited to, any claims related to wages, reimbursements, discrimination, and harassment, whether based on state law, Title VII of the Civil Rights Act of 1964, as amended, as well as all other federal, state or local laws or regulations). It also specifically includes any claim, dispute, and/or controversy relating to the scope, validity, or enforceability of this Arbitration Agreement. Unless the parties agree or otherwise as to a particular dispute, any arbitration pursuant to this Arbitration Agreement shall be initiated with and conducted by the American Arbitration Association, whose rules may be obtained at http://www.adr.org or by calling (800)778-7879. The duty to arbitrate under this Arbitration Agreement survives any termination of Employee's employment with the Company. other federal, state or local laws or regulations). It also specifical-

[1] All dates are in 2013 unless otherwise specified.
[2] On December 19, the Acting Regional Director of Region 29 approved an informal settlement agreement relating to other allegations of the complaint and severed the instant matter for my consideration.
[3] The phrase "team members" refers to those individuals who have successfully completed the application and employment process.

> ly includes any claim, dispute, and/or controversy relating to the scope, validity, or enforceability of this Arbitration Agreement. Unless the parties agree or otherwise as to a particular dispute, any arbitration pursuant to this Arbitration Agreement shall be initiated with and conducted by the American Arbitration Association, whose rules may be obtained at http://www.adr.org or by calling (800)778–7879. The duty to arbitrate under this Arbitration Agreement survives any termination of Employee's employment with the Company.

The Agreement also explains the manner in which disputes will be arbitrated under the Agreement and the section entitled "Form of Arbitration" provides as follows:

> In any arbitration, any claim shall be arbitrated only on an individual basis and not on a class, collective, multiple-party, or private attorney general basis. The employee and the Company expressly waive any right to arbitrate as a class representative, as a class member, in a collective action, or in or pursuant to a private Attorney General capacity, and there shall be no joiner or consolidation of parties.

While the Agreement contains the process and procedure for binding arbitration regarding employment related claims, it also contains certain exceptions. The section entitled "Claims Excepted From Binding Arbitration" identifies the following:

> The sole exceptions to the mandatory arbitration provision are claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under Workers' Compensation, Unemployment Compensation claims filed with the state, claims on an individual basis only which are brought properly in, and only to the extent they remain in, small claims court, and any claims or disputes arising out of any other written contract(s) between Employee and the Company where the contract specifically provides for resolution through the courts. Nothing herein shall prevent Employee from filing and pursuing administrative proceedings only before the U.S. Equal Employment Opportunity Commission or an equivalent state or local agency (although if Employee chooses to pursue a claim following the exhaustion of such administrative remedies, that claim would be subject to arbitration). Nothing herein shall prevent Employee or Company from obtaining from a court a temporary restraining order or preliminary injunctive relief to preserve the status quo or prevent any irreparable harm pending the arbitration of the underlying claim, dispute, and/or controversy.

The Agreement does not contain any confidentiality provisions and does not, by its terms, limit team members' ability to discuss matters subject to arbitration.

The Agreement also allows Domino's team members to opt-out of the obligation to arbitrate claims. The ability for team members to retain this right is spelled out in the Agreement section entitled "Exclusive Opt-Out Right." This provision provides as follows:

> The Employee has the right to opt out of the obligation set forth herein to submit to binding arbitration. To opt out, the Employee must send via electronic mail or first-class mail, within **thirty (30) calendar days** of signing this Arbitration Agreement, an email to PeopleFirstSharedServices@dominos.com or a letter addressed to Domino's Pizza LLC, Attention: Manager-People First Shared Services, 30 Frank Lloyd Wright Drive, Post Office Box 997, Ann Arbor, Michigan 48106-0997, stating that the Employee has elected to opt out of the Arbitration Agreement. The email/letter must clearly state the Employee's name, employee id and a telephone number where the Employee can be reached. Absent the proper and timely exercise of this opt-out right, the Employee will be required to arbitrate all disputes covered by this Arbitration Agreement.

Domino's team members may use the Domino's computer system to learn about the Agreement and review it before signing it. In addition to the Agreement itself, team members have electronic access to related material that includes a cover letter explaining the basic framework for the Domino's arbitration process. Part of this electronic process involves providing team members a Spanish version of the Agreement, if needed. Depending on the legal requirements in certain states, Domino's uses a paper process to introduce and process the acceptance of the Agreement. This paper process provides hard copies of the same documents utilized in the electronic process.

All Domino's team members, including executives and managers, are required to accept the Agreement as a condition of employment.

At the hearing, Respondent made an offer of proof that since the Agreement began to be used in November 2009, over 254 of Domino's team members have selected the opt-out option. In addition, since the implementation of the Agreement, there have been in excess of 85 administrative claims filed against Respondent and there have been at least 10 unfair labor practices charges since 2009. There is no evidence as to how many employees have been hired since the Agreement went into effect or how many are currently affected by its provisions.

II. ANALYSIS AND CONCLUSIONS

The General Counsel and the Charging Party argue that this matter is controlled by the Board's holding in *D.R. Horton*, supra. In that case, the Board considered, in relevant part, an employer's implementation of a rule requiring employees to arbitrate employment disputes and which, as a feature of the rule, prohibited an employee from bringing or participating in any class or collective actions against the employer in any forum including before an arbitrator. The Board recognized that "these forms of collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7 [of the National Labor Relations Act]." *D.R. Horton*, supra, slip op. at 3. The Board found collective redress in legal or administrative settings are "not peripheral but central to the Act's purposes" Id. There, the Board concluded that an employer violates the Act by maintaining a prohibition on the maintenance of class or collective actions in all forums: a circumstance which, as discussed below, is one not presented by the instant case.

Respondent's Proffered Defenses

As an initial matter, Respondent argues that *D.R. Horton* was decided by an unconstitutionally appointed Board and cannot be considered precedent in this matter because the Board lacked a quorum when it issued the decision. This argument derives from the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). The Board has repeatedly rejected this argument, asserting that it will continue to discharge its statutory responsibilities in all respects pending the Supreme Court's resolution of this issue.[4] See e.g., *Universal Lubricants, LLC*, 359 NLRB No. 157, slip op. at 1 fn. 1 (2013); *Woodcrest Health Care Center*, 359 NLRB No. 129, slip op. at 1 fn. 1 (2013); *Bloomingdale's, Inc*., 359 NLRB No. 113 (2013); *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op at fn. 1 (2013).

In a related argument, Respondent further contends that the Regional Director lacked authority to issue the complaint in this matter because at the time he was appointed, the Board lacked the requisite authority to make such appointments, rendering them unconstitutional. Such challenges to the independent statutory authority of the then-Acting General Counsel and his designees (i.e. the agency's regional directors) to investigate and prosecute unfair labor practices have similarly been rejected by the Board. See e.g. *Ardit Co.,* 360 NLRB No. 15, slip op. at 1 (2013); *Bloomingdale's*, supra, slip op. at 1.

Respondent further argues that *D.R. Horton* was wrongly decided and should not be controlling in this matter. As Respondent notes, on December 3, the Fifth Circuit Court of Appeals issued its decision denying, in part, enforcement of the Board's decision and order in *D.R. Horton*. Citing no authority to support such a contention, Respondent argues that the reasoning of the Fifth Circuit's analysis should obtain in this case. Any such arguments made by Respondent as to why *D.R. Horton* was wrongly decided, including its rejection by the courts, must be made directly to the Board and not to me. I am bound by *D.R. Horton* and until either the Board or the Supreme Court overturns it. *Waco Inc*., 273 LRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981); *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004).

Respondent next attempts to distinguish *D.R. Horton* from the instant matter arguing that the Agreement is not unlawful because it specifically excludes claims "arising under the National Labor Relations Act which are brought before the National Labor Relations Board" and because its opt out provision renders the Agreement voluntary and thus does not violate the standard set by the Board in *D.R. Horton*.

As was noted by the Board in *D.R. Horton*, supra slip op. at 4, in evaluating whether a rule applied to all employees as a condition of continued employment, including the mandatory Agreement at issue here, violates Section 8(a)(1), the applicable test is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), citing *U-Haul of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir 2007). Pursuant to this test, the Board has found that if a rule explicitly restricts activities protected by Section 7 of the Act, the rule is unlawful. If it does not explicitly restrict such conduct, the finding of a violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The Board has long held that concerted legal action addressing wages, hours and working conditions, whether in a courtroom setting, before an administrative agency or through arbitration, represents concerted protected activities under Section 7 of the Act. *D.R. Horton*, supra slip op. at 2-3. In *Eastex Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978), the Court stated that: "It has been held that the 'mutual protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums."

In *D.R. Horton*, supra, the agreement at issue was deemed unlawful both because it restricted access to the Board and because it prohibited other collective legal action. However, the Board made clear that there were two distinct and independent bases for finding such agreements unlawful. In this regard, the Board noted that "[t]he right to engage in collective action – including legal action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." *D.R. Horton*, supra, slip op. at 10.

Therefore, while it is true that the Board in *D.R. Horton* found that that employees could reasonably be restrained from filing charges before the Board, there was, as noted above, an independent ground for finding the provision at issue there to be unlawful. Here, while there appears to be no dispute that the ability of employees to seek redress before the Board is not prohibited, it is clear from its terms that the Agreement bans other forms of concerted, protected conduct: i.e. the pursuit of other claims concerning terms and conditions of employment on a collective basis. As the Board has made clear, it is sufficient to find this latter point to conclude that the provision in question runs afoul of the statute. Thus, the clause in the instant matter is unlawful not because it restricts or bars the filing of NLRB charges, but because it interferes with and restricts employees from engaging in other concerted, protected conduct. Therefore, and contrary to Respondent's apparent contentions, the inclusion of the clause concerning the right to file charges before the Board in no way effects the violation of the Act encompassed by the fact that employees are precluded from pursuing class actions in all other forums whether judicial or arbitral. Moreover, I find that reasonable employees would read the Agreement as prohibiting their ability to resolve in concert disputes related to their employment, a right which is clearly conduct protected by the Act. Thus, the Agreement still clearly inhibits and interferes with Section 7 conduct despite this exception.

Respondent further attempts to distinguish *D.R. Horton* on the basis of the Agreement's opt-out language. Respondent maintains that the existence of the opt-out provisions puts the Agreement within the category of voluntary arbitration agreements that the Board has determined presents a "more difficult question." In this regard, Respondent relies upon the following

[4] The Supreme Court granted certiorari and recently heard oral argument on this issue. *NLRB v. Noel Canning*, 133 S.Ct. 2816 (2013).

language contained in *D.R. Horton*, slip op. at 13 fn. 28:

> [W]hether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.

The instant case does not present this sort of "more difficult question." Rather, such a contention misses the point that absent affirmative action on the part of the employee at the inception of their employment, a mandatory waiver of employee rights under the law is clearly, permanently and irrevocably required as a condition of employment, limiting those rights and remedies to which an employee is entitled under the Act.

The Act unambiguously confers to employees the right to engage in protected concerted activities without interference from his or her employer. It follows, therefore, that an employer may not lawfully require its employees to affirmatively act (in this case, opt out, in writing within 30 days) in order to obtain or retain such rights. *Ishikawa Gasket America, Inc*., 337 NLRB 175–176 (2001); *Mandel Security Bureau, Inc*., 202 NLRB 117 (1973). Moreover, those employees who do choose to opt out are precluded from engaging in concerted activities with those who do not, further limiting their options for engaging in conduct protected by the Act. Additionally, the decision making process itself—of whether to consent to or opt out of the Agreement—is itself a mandatory condition of employment as it is required of employees and is not a ministerial matter devoid of consequences. Employees are required to make a decision, under time-sensitive constraints, regarding the relinquishment of certain class action rights they possess under federal law. Whatever choice they make impacts their employment relationship with their employer in perpetuity and, for those who choose not to opt out, precludes them irrevocably from engaging in certain conduct which the Act protects.

Moreover, requiring a new employee to decide whether to irrevocably waive certain core employment rights is an unreasonable burden. It presumes that employees will have considered and consciously relinquished a panoply of rights which might obtain in any variety of circumstances, many of which cannot be reasonably foreseen or anticipated at the outset of employment.

For the foregoing reasons, I find that Respondent's maintenance of and requirement that employees enter into its arbitration agreement, as set forth above, as a condition of employment, unlawfully restricts core rights granted to employees under Section 7 of the Act and is violative of Section 8(a)(1) as alleged in the complaint.

CONCLUSIONS OF LAW

(1) The Respondent, Domino's Pizza, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

(2) At all material times, the Respondent has violated Section 8(a)(1) of the Act by maintaining an arbitration policy that waives the right to collective action in all arbitral and judicial forums, and is applicable to all employees who fail to opt out of coverage under the arbitration policy during a one-time initial opt out period permitted to each employee

(3) The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent's arbitration policy is unlawful, the Respondent shall be ordered to rescind or revise it to make clear to employees in all of its facilities in which the arbitration policy has been implemented that the policy does not require a waiver in arbitral or judicial forums of their right to maintain or participate in collective actions, and shall notify employees of the rescinded or revised policy by providing them a copy of the revised policy or specific notification that the policy has been rescinded. Additionally since the arbitration agreement has been maintained in locations throughout the country, it is appropriate to order that Respondent post the attached notice at all locations where the arbitration agreement has been or is in effect nationwide. *Target Co*., 359 NLRB No. 103, slip op. at 3 (2013), *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 7 (2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Domino's Pizza, its officers, agents and representatives shall

1. Cease and desist from

(a) Maintaining an arbitration agreement (the Agreement) that waives the right to maintain class or collective action in all arbitral or judicial forums and which applies irrevocably to those employees who fail to opt out.

(b) Requiring employees to sign binding arbitration agreements that prohibit collective and class litigation in all arbitral or judicial forums.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the Agreement to make clear to employees that the Agreement does not constitute a waiver in all arbitral or judicial forums of their right to maintain employment-related class or collective actions.

(b) Within 14 days after service by the Region, post at its facilities where the Agreement has been or is in effect, copies of the attached notice marked Appendix. Copies of this notice, on forms provided by the Region Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 con-

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

secutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting or intranet or an internet site, and/or other electronic means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 19, 2012.[6]

(c) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 27, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a binding arbitration agreement (the Agreement) that waives the right for employees to maintain or engage in class or collective actions in all arbitral or judicial forums.

WE WILL NOT require employees to sign binding arbitration agreements that waive the right to maintain or engage in class or collective actions in all arbitral or judicial forums.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in their rights under the Act.

WE WILL rescind or revise the Agreement at all facilities where it has been implemented and is currently in effect and make it clear to employees that the Agreement does not constitute a waiver of their right to maintain or engage in employment-related class or collective actions.

WE WILL notify our employees of the rescinded or revised agreement by providing to them a copy of the revised Agreement or specific notification that it has been rescinded.

DOMINO'S PIZZA, LLC

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board shall read "posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."